

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

JUNIPER NETWORKS, INC., a Delaware
corporation,

Plaintiff,

v.

PALO ALTO NETWORKS, INC., a Delaware
corporation,

Defendant.

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C.A. No. 11-1258-SLR

JURY TRIAL DEMANDED

**DEFENDANT PALO ALTO NETWORKS, INC.'S OBJECTION TO REBUTTAL
TESTIMONY FROM JUNIPER'S INFRINGEMENT EXPERT, DR. RUBIN**

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Dated: March 4, 2014

PAN objects to Juniper's attempt to offer rebuttal testimony from Dr. Rubin, its infringement expert.

Dr. Rubin took the stand during Juniper's case-in-chief on Tuesday morning, February 25. He testified for almost two complete trial days, finally stepping down on Thursday morning, February 27. On Sunday, March 2, Juniper informed PAN's counsel that Juniper intended to re-call Dr. Rubin as a rebuttal witness following the close of PAN's case-in-chief.¹

PAN objects to Juniper's attempt to put on any rebuttal case, much less re-call Dr. Rubin as a rebuttal witness. A plaintiff in a patent case is given the opportunity to put on a rebuttal case in limited circumstances. For example, once the plaintiff puts on its case-in-chief for issues which it bears the burden of proof (i.e., infringement), the defendant, in its case in chief, offers non-infringement testimony and, in most cases, put on its invalidity case, the issue for which it bears the burden of proof. At that point, the plaintiff typically is permitted to put on a rebuttal case, but only to rebut defendant's invalidity positions. Here, as the result of pre-trial motion practice, invalidity issues were not tried to the jury. As a result, there is nothing for Juniper to rebut and Dr. Rubin, Juniper's infringement expert, should not be permitted to testify again.

Juniper has not provided PAN with the intended subject of its proposed rebuttal. Nevertheless, regardless of what Juniper says or does not say, there is no basis to permit such testimony. Rebuttal testimony is limited to instances where the testimony sought to be rebutted could not have been anticipated. Here, Dr. Mitzenmacher, PAN's non-infringement expert, offered no testimony that was not previously disclosed in either his expert report or at his deposition. As this Court has held, rebuttal testimony is permitted only where the party can

¹ In response to Juniper's notice that it intended to re-call Dr. Rubin, PAN asked that Juniper provide the intended subject of Dr. Rubin's proposed rebuttal testimony. Juniper never responded.

demonstrate “true surprise.” *Cordis Corp. v. Medtronic Vascular, Inc.*, CIV. 97-550-SLR, 2005 WL 885381, *6 (D. Del. Feb. 28, 2005), rev'd in part sub nom. *Cordis Corp. v. Medtronic Ave, Inc.*, 511 F.3d 1157, supplemented sub nom. *Cordis Corp. v. Boston Scientific Corp.*, 275 F. App'x 966 (Fed. Cir. 2008). Juniper cannot meet that standard and should not be allowed to re-call Dr. Rubin as a rebuttal witness.

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By: /s/ Philip A. Rovner

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CERTIFICATE OF SERVICE

I, Philip A. Rovner, hereby certify that on March 4, 2014 the within document was electronically filed with the Clerk of the Court using CM/ECF which will send notification to the registered attorney(s) of record that the document has been filed and is available for viewing and downloading.

I further certify that on March 4, 2014, the within document was served on the following persons as indicated:

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